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CASE NOS.: **2003-LHC-01885**
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OWCP NOS.: **1-157419**
1-157420
1-154120
1-154084

In the Matter of

LAURYN BRUCE STEWART
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

Appearances:

Marcia J. Cleveland, Esquire, Marcia J. Cleveland, LLC, Topsham, Maine, for the Claimant

Stephen Hessert, Esquire, Norman Hanson & DeTroy, LLC, Portland, Maine, for the Employer

DECISION AND ORDER AWARDING BENEFITS CLAIM

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Lauryn Bruce Stewart (the "Claimant"), against Bath Iron Works Corporation ("BIW" or "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Portland, Maine on November 19, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The parties offered stipulations, and testimony was heard from the Claimant, from a BIW manager and from a vocational rehabilitation specialist. Documentary

evidence was admitted without objection as Claimant's Exhibits ("CX") 1-11. The Claimant objected to all but two of the Employer's Exhibits on the ground that they were not provided in a timely fashion. Hearing Transcript ("TR") 15. The Employer's Exhibits ("EX") 1-56 were admitted over the Claimant's objection. TR 16. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-7. Thereafter, the parties filed briefs. The record is now closed.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties stipulated to two facts: (1) the Longshore Act applies; and (2) an employer/employee relationship existed at all relevant times. TR 7.

The case includes claims involving four alleged injuries. The issues in dispute include (1) whether the notices of the alleged January 30, 2001 injury for bilateral carpal tunnel syndrome and the alleged May 16, 2002 right shoulder injury were timely; (2) whether the February 14, 2000 neck injury is causally related to the Claimant's employment; (3) whether an alleged bilateral carpal tunnel syndrome injury of January 30, 2001 occurred; (4) whether the alleged right knee injury of February 7, 2002 occurred; (5) whether the alleged right shoulder injury of May 16, 2002 occurred; (6) the nature and extent of disability for all four alleged injuries; and (7) the appropriate average weekly for all four injuries.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, Bruce Stewart, was 43 years old at the time of the hearing. TR 17. He completed the 11th grade and later earned his GED. TR 18. He began working at the Bath Iron Works shipyard on April 14, 1989. *Id.* Initially he was assigned work as a shipboard carpenter. After three years he was assigned to maintenance where his duties included painting and dry walling in the shipyard offices. *Id*. At some point he was assigned to the pipefitter unit and worked mainly on the ship in the steering gear area. TR 19. Mr. Stewart testified that he used high pressure hydraulics to perform his duties. *Id*. He remained in the pipefitter department until he left the shipyard in February 2002. TR 20. The Claimant reported that his pipefitter duties required him to operate grinders called flapper wheels approximately 50% of the day. TR 22-23. He also stated that he welded the pipe hangers in place and used other grinders to remove paint from pipes and hangers. TR 24-25. The Claimant reported that most of his work in the steering gear area of the ship involved overhead work. TR 28.

The Claimant testified that on February 14, 2000 he hit his head on a drain tap and pulled his neck back, causing pain. TR 20-21. He went to the first aid department at the shipyard and was referred to several places for physical therapy and to chiropractors. TR 21. The Claimant stated that he missed some work after this injury and that he received compensation for the time he was out of work. TR 21-22. The Claimant acknowledged on cross-examination that after a short period he returned to work in his regular job as a pipefitter without restrictions. He

admitted that he continued to perform his normal job after this injury until he went out of work in February 2002 for a knee injury. TR 39-41.

On January 30, 2001 the Claimant saw Dr. Pavlak for routine follow-up on his neck condition. At this appointment the Claimant reported that he was experiencing numbness and tingling in his fingers and that his hands would become numb. He also reported right shoulder pain of two weeks duration. TR 26. Dr. Pavlak examined his hands and ordered nerve conduction tests. Dr. Pavlak diagnosed bilateral carpel tunnel syndrome, and gave him night splints. The Claimant returned to his job and he continued to perform his regular job until February 7, 2002, when he left work for a knee injury.

As far as his right shoulder injury is concerned, he Claimant testified that he first began having a shoulder problem going down the ladder in 1995 or 1996. TR 26-27. He recalled an incident involving what are referred to as the "funny stairs." Given the description the Claimant provided, "funny stairs" appear to be alternating, staggered, single metal footholds. As the Claimant descended the stairs, he slipped and reached up and grabbed wires to keep from falling further and he was able to swing himself back onto the stair. TR 27. The Claimant reported that he has had problems with his right shoulder ever since the 1995 incident. TR 28. He claimed that his right shoulder never improved after the 1995 incident. TR 55. More recently, on January 30, 2001, the Claimant reported to Dr. Pavlak that his right shoulder had begun to cause pain over the preceding two weeks. CX 6 at 32. Dr. Pavlak examined the Claimant's shoulder and he diagnosed a possible impingement. CX 6 at 33. He gave the Claimant a Depo-Medrol and Marcaine injection and sent him to physical therapy. By the end of February 2001, Dr. Pavlak re-examined the Claimant's right shoulder and noted that his shoulder condition had resolved. CX 6 at 36. The Claimant saw Dr. Pavlak several times throughout the remainder of 2001 and through May 2002 and did not report shoulder pain at any point during this period. CX 6 at 38-47. He stated that in the period just before he left the shipyard for an unrelated condition on February 7, 2002, any overhead work "was awful, to the point grabbing, even walking up the straight ladders" was difficult. TR 28. During his August 8, 2002 visit to Dr. Pavlak, the Claimant told Dr. Pavlak he had pain in the right shoulder, neck and hands. CX 6 at 50. Throughout the remainder of 2002 and into early 2003, the Claimant continued to report right shoulder pain. CX 6 at 52-58, 61-68.[1] Dr. Pavlak never assigned the Claimant any work restrictions for his shoulder and the Claimant did not loose time from work for this condition.

With regard to the alleged knee injury of February 7, 2002, the Claimant acknowledged that he never had a traumatic injury to the knee. TR 44. Rather, he attributed the alleged right knee condition of February 7, 2002 to "just overuse on the ladders. It just continually bothered me for quite sometime." TR 25. The Claimant stated that he reported his knee condition to the shipyard first aid. TR 25-26. He also consulted Dr. Wickenden and his physician's assistant Mr. Bennett. The Claimant was treated with rest and a cortisone injection and Dr. Wickenden cleared him to return to work in April 2002, with direction to restrict kneeling, squatting, and crawling and to use knee pads. CX 11 107, 108-109. On cross-examination, the Complainant conceded that he had experienced similar knee discomfort in 1994 or 1995 and that he was

[1] The Claimant testified that he began treating with Dr. Mancini for his shoulder condition in the summer of 2003. TR 50. His primary care physician, Dr. Pavlak, referred him to Dr. Mancini in early May 2003. *Id*.; CX 6 at 69. Dr. Mancini performed surgery on the Claimant's right shoulder in the fall of 2003. TR 52.

treated by Dr. Wickenden for the same type of knee condition. The Claimant never had work restrictions as a result of that earlier condition and he had continued to perform his job as a pipefitter up through February 2002. TR 45-46.

The Claimant never returned to work after Dr. Wickenden cleared him to return in April 2002, because Dr. Pavlak imposed work restrictions for his bilateral carpal tunnel syndrome and his cervical spondylosis on March 28, 2002. CX 6 at 44, 45. The Employer was unable to accommodate the restrictions Dr. Pavlak imposed.[2]

The Claimant admitted that he has not looked for work since he left the shipyard because he has been receiving accident and sickness payments from his insurance company. TR 32. He also stated that he did not believe he could find any work that would pay enough to cover his mortgage payment. *Id*.

The Claimant reports that on good days he is able to get out of the house and do some fishing as he has a boat. TR 54. He is able to lift his arms over his shoulders. *Id*.

On cross-examination he admitted that when he saw Dr. Herzog at the request of BIW in the summer of 2003, he told Dr. Herzog that his right knee condition had resolved. TR 56. The Claimant also acknowledged that he has not had neck surgery and no physician was recommending surgery for neck. TR 57. He also indicated he has not had surgery for carpal tunnel syndrome or the right knee injury. TR 57.

The Claimant testified that Dr. Pavlak recommended work restrictions approximately two years before he imposed them in March 2002. TR 60. The Claimant explained that he didn't want restrictions because he was working on the steering gears on boats and he was concerned that he would get pulled out of that job or sent home if he had work restrictions. TR 60-61.

B. Timeliness of Notice of Injury and Filing of Claim

Section 12(a) of the Act, 33 U.S.C. § 912(a), provides:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in case of an occupational disease which does not immediately result in disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given (1) to the deputy

[2] The Claimant stated that he was also being treated for depression and anxiety. TR 30-32.

commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

Thus, the injured employee is required to give the employer written notice of the injury within thirty days of the date of injury or thirty days after the Employee is aware, or in the should be aware of a relationship between the injury and his employment. Section 12(d) of the Act provides that failure to provide written notice of the injury will not bar a claim if the Employer or insurance carrier had actual knowledge of the injury, or if the Employer or Carrier has not suffered prejudice as a result of the failure to receive notice or if the Employee establishes good cause for its failure to provide notice. 33 U.S.C. § 912(d).

BIW contends that the Claimant failed to provide the required notice of injury with regard to his alleged right shoulder and bilateral carpal tunnel injuries within thirty days after the date of injury as required under the statutory provision. Emp. Br. at 3-5. The Claimant acknowledges that he did not provide timely written notice of these two injuries.[3] Nevertheless, the Claimant asserts that BIW had actual knowledge of both the right shoulder and bilateral carpal tunnel injuries, and therefore, he argues that his failure to provide written notice is excused. Cl. Br. at 3-4. In support of his position that the company had actual knowledge of the injuries, the Claimant notes that Dr. Pavlak sent regular reports to Dr. Mazzora at Bath Iron Works First Aid. The Claimant correctly states that Dr. Pavlak's report of January 30, 2001 mentions that working overhead is causing the Complainant problems with his shoulder and it also indicates that the Claimant has bilateral carpal tunnel syndrome. CX 6 at 32-33, 34-35. In this report, Dr. Pavlak specifically indicates that the Claimant has a possible right shoulder impingement and also bilateral carpal tunnel syndrome. I find that the Employer had knowledge of the Claimant's right shoulder and bilateral carpal tunnel. Additionally, the Employer has not presented any evidence showing that it was prejudiced by the Claimant's failure to timely report the two injuries discussed above. Accordingly, I conclude that the notice of injury for the alleged shoulder and bilateral carpal tunnel injuries were timely.

C. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the

[3] The Claimant alleges May 16, 2002 as the date of the right shoulder injury. The LS-201 notifying the Employer of the injury was filed on December 13, 2002. CX 3 at 9. The date of injury for the bilateral carpal tunnel injury is January 31, 2001, however, the LS-201 notifying the Employer of the injury was not filed until October 8, 2001. CX 5 at 21. The notice of injury for both of these alleged injuries was untimely.

Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Company v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP,* 688 F. 2d 862 (1st Cir. 1982).

The Employer challenges causation with respect to the neck injury of February 14, 2000, the alleged bilateral carpal tunnel syndrome injury of January 30, 2001, the alleged right knee injury of February 7, 2002, and the alleged right shoulder injury of May 16, 2002. The Claimant's brief on the causation issue does not discuss the specifics of the medical evidence of record as it relates to any of the alleged injuries. Cl. Br. at 4-6.[4] In general, the Claimant argues that all of his injuries are chronic and work-related citing the opinion of his primary physician, Dr. Pavlak. Cl. Br. at 4. The Claimant also contends that the opinion of the treating physician is entitled to greater weight than the opinions of "physicians hired to evaluate a claimant for litigation purposes." *Id*. The Claimant asserts that he resisted his physician's work restrictions for two years for fear of losing his job. His increasing pain finally convinced him to let his doctor issue some work restrictions. The Claimant argues that once those restrictions were issued he was put out of work. Cl. Br. at 5. Finally, the Claimant attempts to discredit the opinions of Dr. Herzog, who examined the Claimant on behalf of BIW. First, the Claimant argues that a snapshot of his physical state, which is what Dr. Herzog's examinations provided, cannot tell the story because his conditions are chronic and vary from day to day. Cl. Br. at 5. Second, the Claimant asserts that Dr. Herzog did not know the Claimant's medical history. Cl. Br. at 6. I will separately evaluate the evidence of record with respect to the causation issue for each disputed injury.

[4] The Claimant's discussion of the key issue of causation as it relates to the four separate injuries totals three pages.

1. Neck Injury – February 14, 2000

The Claimant asserts that he injured his neck on February 14, 2000 when he hit his head at work. He contends that his neck injury is chronic and results from several instances of hitting his head at work and from years of overhead work at the shipyard. Cl. Br. at 4-6. The Employer concedes that the Claimant injured his neck at the shipyard on February 14; however the Employer disputes "ongoing medical causation." Emp. Br. at 2, 20. There is no recognized concept of "ongoing medical causation" that is different or separate from the issue of causation, that is, whether the claimed injury is causally related to a Claimant's employment. Therefore, I construe the Employer's challenge to "ongoing medical causation" as disputing causation with regard to the Claimant's neck injury.

The Claimant testified that on February 14, 2002 he hit his head on a drain pipe injuring his neck. TR 20-22. Initially, the Claimant was treated by Dr. Mazorra at the shipyard first aid. On the Claimant's request, Dr. Mazorra referred the Claimant to Dr. Pavlak shortly thereafter. TR 21; CX 8 at 88. The Claimant reports that he received compensation for the short time he lost with this injury. TR 21.

The Claimant first saw Dr. Pavlak on March 17, 2000. He told Dr. Pavlak that he had hit or bumped his head on several occasions over the years with the most recent event occurring February 14. In his report to Dr. Mazorra, Dr. Pavlak noted that the Claimant had been seen several times by the first aid department at the shipyard for neck injuries. CX 6 at 25-27. Dr. Pavlak's examination revealed trigger point tenderness of the right trapezius, intact sensation in the upper extremities, normal strength in both upper extremities. Dr. Pavlak ordered x-rays which showed disk degeneration in the C5-6 and C6-7 area with small anterior osteophytes and calcification. CX 6 at 26. Dr. Pavlak concluded that the Claimant's neck pain was "predominately myofascial" although he noted the Claimant had "underlying degenerative disk disease which may be, in part, triggering his myofascial pain or contributing to his axial pain." *Id*. Dr. Pavlak recommended physical therapy, a home traction program and he prescribed Celebrex for degenerative disk disease and cervical arthritis. CX 6 at 26-27. He did not assign the Claimant work restrictions for his neck injury at this point.

The Claimant continued to see Dr. Pavlak over several months and continued to report neck pain. This prompted Dr. Pavlak to request an MRI in August 2000 and to start the Claimant on Ultram for pain relief. The Claimant next saw Dr. Pavlak on January 30, 2001. At this point he stated that his neck pain has improved with Ultram and that he is careful with how he moves. CX 6 at 32. Therefore, the Claimant told Dr. Pavlak he did not want to proceed with an MRI or with facet joint blocks. *Id.* As his neck condition appeared to be stable with the use of Ultram and activity modification, Dr. Pavlak's notes indicate that no further work-up or treatment for the neck condition was necessary. CX 6 at 33.

The Claimant saw Dr. Pavlak again on February 2001 and did not report any neck pain. The next time the Claimant reported neck pain to Dr. Pavlak was on May 7, 2001. CX 6 at 38. The Claimant stated that overhead work bothers him and that he continues to bump his head occasionally which does not help. *Id.* Dr. Pavlak concluded that the Claimant has recurrent neck pain as a result of his degenerative spondylosis and he noted that he discussed possible

restrictions of overhead work as a result of this condition. Dr. Pavlak also discussed other more aggressive treatment options with the Claimant. They agreed to assess his neck condition over the coming months.

On his July 24, 2001 visit, Dr. Pavlak noted the Claimant was experiencing continued pain with his neck, especially when he works with his right arm raised above the shoulder level. The Claimant reported that the pain is in his neck area and not the shoulder. The examination revealed mild restriction of the range of motion of the cervical spine and some tenderness in the right cervical paraspinals. Neurological examination was normal and no radiculopathy was detected. CX 6 at 40. Dr. Pavlak notes the continued neck pain and he attributes the ongoing pain to aggravation of the Claimant's degenerative disk disease by his overhead work as a pipefitter. *Id.* Dr. Pavlak continues the Claimant on Celebrex and Ultram and suggests that work restrictions may be appropriate, but notes the Claimant's concern regarding the availability of modified duty work. CX 6 at 41.[5] The Claimant continued to perform his usual job at the shipyard.

The Claimant next saw Dr. Pavlak on March 28, 2002. At that point the Claimant stated his neck was essentially the same and that it bothered him to do a lot of overhead work. CX 6 at 43. Dr. Pavlak's notes reflect that the Claimant had been out of work for the last six weeks for a knee condition being treated by another physician. On physical examination, Dr. Pavlak detected minimal restriction in range of motion of the cervical spine and he concluded that the Claimant continues to have the same symptoms of cervical spondylosis that he has had in the past. *Id.* Dr. Pavlak's notes show that at the March visit, both the Claimant and Dr. Pavlak were more concerned with the Claimant's reported numbness and tingling in his hands. At this time the Claimant told the Doctor he would like work restrictions. CX 6 at 44. Dr. Pavlak assigned the Claimant what he described as "standard routine restrictions for carpal tunnel syndrome" and he also imposed restrictions from excessive overhead work for the Claimant's neck condition. CX 6 at 44, 45.

On August 8, 2002 the Claimant saw Dr. Pavlak on follow-up and reported neck, right shoulder and bilateral hand pain. CX 6 at 50. The Claimant reports that his pain level on a scale of 1-10 is an 8. He reports some relief from the pain medications but states that standing on hard surfaces or repetitive hand work exacerbates his symptoms. *Id.* On physical examination, Dr. Pavlak recorded no acute distress or pain behaviors during examination and stated the Claimant moves around the room freely. He continued the work restrictions he had assigned in March 2002. CX 6 at 51, 52. At the September 13, 2002 appointment, the Claimant continues to report pain at a constant level 8 in the neck, shoulder and hands, and states that the shoulder was causing the most pain that day. Dr. Pavlak did not offer any treatment for the Claimant's chronic neck pain other than continuing with Celebrex and Ultram as recommended.

On November 18, 2002, Dr. Pavlak sent a letter to BIW's workers' compensation department responding to an inquiry on the Claimant's condition. With regard to the neck

[5] Although the record contains a handwritten note from Dr. Pavlak on September 11, 2001 indicating the Claimant "should not engage in any work above eye or shoulder level as a consequence of his work-relate injury," there is no evidence that this restriction was communicated to BIW by the Doctor or the Claimant at that time. CX 6 at 42.

condition, Dr. Pavlak's letter described the Claimant's neck condition as chronic and likely to remain static and not worsen, but unlikely to improve. CX 6 at 60. Dr. Pavlak opined that the neck condition was related to the Claimant's work, noting that BIW records reflect that the Claimant had multiple episodes of recurrent neck pain almost all the result of bumping his head in tight work areas before the February 2000 incident. Dr. Pavlak also noted that the Claimant works overhead all the time and he opined further that these two factors resulted in the Claimant's chronic neck condition. CX 6 at 59.

The Claimant consulted Dr. Pavlak again on February 13, 2003 and the examination finds stiffness and lack of mobility in the upper neck and shoulder. CX 6 at 63. Dr. Pavlak notes chronic cervicalgia with cervical disk disease. *Id*. Dr. Pavlak's treatment during the remainder of 2003 focused mainly on the Claimant's right shoulder condition and he eventually referred the Claimant to an orthopedic surgeon in May 2003. CX 6 at 69-71.

Dr. Pavlak diagnosed chronic neck pain and he attributed the Claimant's ongoing pain to aggravations of the Claimant's underlying cervical disk disease caused by his overhead work. Dr. Pavlak's opinion is sufficient to invoke the presumption that the Claimant's neck injury and chronic neck pain are causally related to his work at the shipyard.

The burden now shifts to the Employer to rebut the presumption by proving the absence of or severing the connection between such harm and working conditions. The Employer relies upon the reports and testimony of Vincent Herzog, D.O., to rebut the presumption. Dr. Herzog is an osteopathic physician, who is also board certified in physiatry, which is the specialty of rehabilitation medicine. Dr. Herzog examined the Claimant at the Employer's request on two occasions, June 11, 2002 and June 2, 2003. EX 45. At the June 2002 examination, the Claimant reported that he hurt his neck when he bumped his head on a drain line in February 2000, and he reported that he had spondylosis in his neck. *Id.* at 269-270. On examination, Dr. Herzog observed "full spinal mobility cervical spine" but noted "mild cervical crepitance with full circumduction." Dr. Herzog also noted normal neurologic examination. *Id.* at 271. Dr. Herzog's impression was that the Claimant has "subjective complaint neck pain, normal examination, strain injury February 14, 2000 resolved; probable underlying degenerative joint disease." *Id*. At the second examination in June 2003, Dr. Herzog noted continued complaints of neck pain, and a negative Spurlings' test indicating the pain was localized and non radicular. *Id.* at 266. He also reported that the Claimant stated an MRI showed bulging cervical disks and cervical arthritis. *Id*. Dr. Herzog did not have any updated medical records at the time of the second examination. *Id.* at 267. Dr. Herzog recommended stretching for the Claimant's chronic cervical strain. He stated that the muscle strain component would resolve over time, but that the underlying arthritic condition would progress. *Id.* at 268. He also opined that the Claimant's cervical strain had reached a point of maximum medical improvement and using the American Medical Association Guides, he assessed a permanent impairment of 5%. *Id*.

Although Dr. Herzog's first examination report of June 2002 stated that the Claimant's neck strain injury resolved, his 2003 report stated, "his cervical strain has a mild residual muscular component and is still resolving." EX 45 at 268. Dr. Herzog's 2003 report did not offer an opinion as to whether the "still resolving" neck injury was related to the Claimant's work. In his deposition, Dr. Herzog stated that at the time of his 2003 examination of the

Claimant, the Claimant's neck condition was essentially the same and he believed the Claimant had an underlying arthritic process in his neck. EX 56 at 25-26. Dr. Herzog was of the opinion that it was "not probable" that the incident on February 14, 2000 caused the Claimant's arthritic condition. *Id*. Dr. Herzog did not explain the basis for this opinion. Thus, I conclude that Dr. Herzog's opinion falls short of an unequivocal statement to a reasonable degree of medical certainty, that the neck injury and ongoing chronic pain and limitation in range of motion is not related to the Claimant's work at BIW. In addition, Dr. Pavlak did not attribute the underlying cervical disk disease to the Claimant's work. Rather, Dr. Pavlak believed that the Claimant's extensive overhead work aggravates or exacerbates the disk disease and increases pain. Dr. Pavlak's explanation that the Claimant's cervical disk disease is aggravated by overhead work is credible. Under these circumstances, I find that the Employer failed to rebut the Claimant's prima facie case, and therefore, the Claimant has successfully established causation with regard to his neck injury and chronic neck pain.

2. Bilateral carpal tunnel syndrome – January 30, 2001

The Claimant asserts that Dr. Pavlak diagnosed carpal tunnel syndrome in January 2001, and attributed the condition to the manner in which the Claimant used his hands as a pipe fitter. Cl. Br. at 4. Dr. Pavlak's report of January 30, 2001 reflects that the Claimant reports that he has numbness and tingling in his hands, and some pain in his wrists that has progressed over the last several months. CX 6 at 32. On examination Dr. Pavlak found normal strength, sensation and reflexes in both upper extremities. Dr. Pavlak reported that Phalen's test was positive for both hands after only 20 seconds and that palpitation of the wrist and hand revealed some tenderness over the ulnar extensor tendons. As a result, Dr. Pavlak ordered electrophysiologic or EMG nerve conduction tests of both upper extremities, which were done the same day. *Id.* at 34-35. The studies were entirely normal on the right hand/wrist. *Id*. On the left there was "prolongation of the left median sensory and transcarpal latency with the motor latency being at the upper limit of normal but still within normal limits." *Id.* at 34. Dr. Pavlak concluded that the Claimant had mild carpal tunnel syndrome and he instructed the Claimant to use splints at night and stated he would reassess the carpal tunnel condition in a month. *Id.* at 35. Dr. Pavlak's February 28, 2001 report notes the Claimant reports that the numbness and tingling in his hands has improved with use of the night splints. The Claimant continued to report some wrist pain. During this visit, the physical examination showed "some focal tenderness at the base of the first metacarpal but no CMC or interphalangeal joint tenderness…" *Id.* at 36. Dr. Pavlak did note some pain in the right wrist which he attributed to osteoarthritis aggravated by work activities. Dr. Pavlak directed the Claimant to return in May for reassessment. As a result of his examination findings, Dr. Pavlak opined that the carpal tunnel syndrome is "substantially improved." *Id*. It is noteworthy that the Claimant continued to work at his usual job and did not miss time from work during this two month period.

On May 7, 2001, the Claimant saw Dr. Pavlak again. He reported less pain in his hands and wrists with only occasional numbness and Dr. Pavlak noted that as far as his hands were concerned "things are going well" and he would not recommend any further treatment, other than the medication Celebrex, for arthritis. *Id.* at 38. The July 24, 2001 visit primarily addressed the Claimant's neck condition and Dr. Pavlak noted in passing that he gets occasional numbness and tingling from CTS. *Id.* at 40. No treatment was offered for CTS.

The Claimant next saw Dr. Pavlak eight months later in March 2002. At this point, the Claimant complained of numbness and tingling in his hands, worse on the left, and he reported that he is awakened at night, at times. The Claimant also told Dr. Pavlak that he had not been using his night splints regularly. *Id*. at 43. At the time of this visit, Dr. Pavlak noted that the Claimant had been out of work for six weeks due to a knee condition being treated by another physician. *Id*. Dr. Pavlak ordered another EMG nerve conduction study. Dr. Pavlak's report also notes that the Claimant would consider work restrictions. Therefore, Dr. Pavlak indicated he gave the Claimant "the standard routine restrictions for carpal tunnel syndrome in the way of light duty weight restriction with no repetitive use of the hands, wrists, or forearms or use of vibrating or pneumatic equipment." *Id.* As noted previously, Dr. Pavlak also restricted the Claimant from ladder climbing and from overhead work. *Id.* at 44-45.

The Claimant followed up with Dr. Pavlak on May 9, 2002. *Id.* at 46. The Doctor's notes reflect that the Claimant continues to experience hand numbness and tingling but it is not as frequent. The Doctor indicates that the Claimant has been out of work for approximately two months for other reasons and he again notes that the Claimant has not been using the night splints regularly as the doctor had advised. Dr. Pavlak stated that based upon the recent EMG studies the Claimant has "very mild carpal tunnel syndrome with the most sensitive techniques being barely positive at the limit of electrophysiologic detectability in his case." *Id.* at 47. Dr. Pavlak opined that the minimal findings he detected may be explained by the fact that the Claimant has been out of work for two months and may be improving as a result. *Id*. As a consequence of the mild nature of his carpal tunnel, Dr. Pavlak stated that he would not recommend surgery. Rather, he directed the Claimant to use his night splints regularly and he continued the carpal tunnel work restrictions he had given two months previously. *Id*. The Claimant did not receive any treatment for CTS during the remaining months of 2002 or during 2003. CX 6 at 49-58, 61-71. The primary focus of Dr. Pavlak's treatment after May 2001 was the Claimant's reported right shoulder and neck pain. *Id*.

In a letter to BIW's workers' compensation department on November 18, 2002, Dr. Pavlak expressed his opinion that the Claimant's bilateral carpal tunnel condition (CTS) was the result of long years of exposure to cumulative trauma to the hands, wrists and forearms. He opined that it is not an acute problem that simply resolves itself when the inciting factor is removed. *Id.* at 59. He also stated that the Claimant's CTS would remain static as long as he does not expose himself to cumulative trauma. *Id*. Based on Dr. Pavlak's opinion that the Claimant's CTS was caused by his employment as a pipefitter, the Claimant has successfully invoked the presumption of causation.

The Employer turns to Dr. Herzog to rebut the presumption. In addition to his board certification in physiatry, Dr. Herzog is also holds board certification in the specialty of electrophysiology or nerve testing. *Id*. As noted, Dr. Herzog examined the Claimant on two occasions. EX 56 at 6-7, 22-23. In the course of his assessment and examination of the Claimant, Dr. Herzog reviewed the EMG or nerve conduction studies that Dr. Pavlak performed. Dr. Herzog testified that the studies showed "normal motor conductions and the delay on the sensory conduction was so mild that I didn't think that [the Claimant] met the criteria for carpal tunnel." *Id.*at 12. On examination, Dr. Herzog reported that the Claimant had non-organic

findings on the Tinel's test in that he reported pain in all fingers when the classic carpal tunnel syndrome response would produce pain only in the first three digits. EX 56 at 16-17; EX 45 269-271, 266-268. Dr. Herzog also reported that the Claimant had a negative response to the Phalen's maneuver after one minute and that the Phalen's maneuver is basically a nerve conduction test. EX 56 at 17-18. Dr. Herzog explained that the two tests, Tinel's and Phalen's, each can help build the foundation for the other. He noted that "with one being completely negative at a full minute, you really wouldn't expect a positive Tinel's." *Id.* at 18. Therefore, after evaluating the inconsistent examination results and the results of EMG studies, Dr. Herzog concluded that the Claimant did not have carpal tunnel syndrome. *Id.* at 18-19. When he examined the Claimant the second time in June 2003, Dr. Herzog repeated the tests for carpal tunnel and obtained the same inconsistent results, "negative Phalen's with nonspecific Tinel's testing, tingling in all fingers in both sides." *Id.* at 25, *see also* EX 45 at 266-273. Dr. Herzog explained the basis for his opinion that the Claimant does not have carpal tunnel syndrome. Therefore, I find that the Employer has successfully rebutted the presumption of causation and the presumption falls out of the case. I must now consider all of the relevant evidence in determining whether the Claimant has carried his burden of showing that the alleged CTS condition is present and work-related.

The opinions of the medical experts with regard to the Claimant's claimed carpal tunnel syndrome injury differ. Nerve conduction tests along with examination findings are the tools physicians use to diagnose carpal tunnel syndrome. Dr. Herzog is board certified in electrophysiology or nerve testing. In resolving the conflicting medical opinions, I accord greater weight to the opinion of Dr. Herzog as he provided a reasoned explanation for his opinion that the Claimant's diagnosis of carpal tunnel syndrome was incorrect. Dr. Herzog's opinion was consistent with his examination findings and with the objective EMG test results. Moreover, he holds board certification in nerve testing, and therefore, I credit his interpretation of the EMG test results over that of Dr. Pavlak, who is not board certified in electrophysiology. I note however, that even Dr. Pavlak, in interpreting the EMG test results, noted that the results were barely detectable for CTS further undermining his diagnosis. In light of the minimal objective findings on examination and the essentially normal EMG testing, I find that Dr. Pavlak's diagnosis of carpal tunnel syndrome is not well supported by the objective evidence of record.

The timing of the Claimant's complaints and the nature of treatment provided by Dr. Pavlak also raise questions as to his diagnosis. In this regard, it is noteworthy that the Claimant initially reported some pain, numbness and tingling in January 2001. A month later the Claimant reported his condition had improved with night splints and after minimal examination findings Dr. Pavlak stated his CTS is "substantially improved." Four months later in May 2001, the Claimant continued to report less pain and only occasional numbness and after examination Dr. Pavlak stated "things are going well" and indicated no further treatment was recommend. The Claimant did not see Dr. Pavlak again until eight months later on March 28, 2002. The Claimant continued to perform his usual job as a pipefitter from January 2001, when he first reported pain in the hands and wrists, until February 2002 when he left the shipyard because of a knee injury. During this period he never reported any hand pain, numbness or tingling to BIW. The fact that the Claimant next reported hand and wrist pain eight months after his last visit with Dr. Pavlak and two months after he had stopped working for a knee injury raises suspicion. Dr. Pavlak

found his hands and wrists were in good condition. Furthermore, because the Claimant had stopped working due to the knee injury, he would not have been using his hands, wrist or arm repetitively. Adding to the suspect nature of the Claimant's reports of pain, numbness and tingling is the surveillance evidence. EX 32, 34, 36 and 38. The surveillance tapes taken in the summer of 2002 and in 2003 show the Claimant engaging in activities requiring the use of his hands, arms, and wrists in a repetitive and forceful manner. For example, the Claimant is observed several times hoisting himself and climbing into and out of his boat which is on a trailer in his yard, carrying gasoline cans and carrying a large wet vac up into the boat, vacuuming his boat and vehicle, attaching the cover over the boat which required vigorous pulling and pushing activity to snap the cover in place. The surveillance evidence demonstrates a level of activity that is not consistent with the Claimant's reports of his condition to Dr. Pavlak or with one experience pain at a level of 8 on a scale of 1-10.[6] Accordingly, I conclude that the Claimant failed to carry his burden of establishing that he suffered a bilateral carpal tunnel syndrome injury on January 30, 2001.

3. The Right Knee Injury - February 7, 2002

The Claimant testified that he did not suffer a traumatic injury to his right knee. He stated that he experienced pain in the right knee over the previous few months and he believes his knee injury is an overuse injury resulting from climbing ladders at the shipyard. The Claimant acknowledged that he had previously seen Dr. Roger Wickenden for a right knee injury in 1994 or 1995. TR 45-46. He also admitted that the earlier knee condition involved basically the same complaints as the alleged knee injury on February 7, 2002. *Id*. He stated that work limitations were not imposed for the earlier knee injury and that he continued to perform his job as pipe fitter. *Id*. The Employer contends that the medical evidence does not establish a new knee injury arising out of work at the shipyard on February 7, 2002. Emp. Br. at 18-19.

On February 7, 2002, the Claimant reported to the shipyard first aid with complainants of right knee pain. He consulted with Dr. Wickenden, and was seen by Dr. Wickenden's physician's assistant, Mr. Bennett, on February 13, 2002. CX 11. At that time, the Claimant was described as ambulating with a "slightly antalgic gait" and wearing an over-the-counter knee brace. *Id*. Examination revealed a diminished range of motion in the right knee, mild crepitus and focal tenderness over the joint line. Mr. Bennett assessed a right knee lateral meniscus degenerative tear and ordered an MRI based upon his examination findings. Mr. Bennett assigned work restrictions and limited the Claimant to desk work or no work, which resulted in the Claimant being out of work. *Id.* at 105; EX 47 at 279. He also directed the Claimant to return for re-examination. CX 11 at 105. The MRI results were normal and did not show a meniscal

[6] In addition, even though Dr. Pavlak recommended that the Claimant wear night splints to treat his carpal tunnel syndrome, Dr. Pavlak's notes of March and May 2002 report that the Claimant was not wearing the night splints regularly as directed. One would reasonably expect that if the Claimant were experiencing the continuous pain, at a level of 8 on a scale of 1-10, and tingling and numbness as he reported, he would comply with the treatment recommended by Dr. Pavlak. The Claimant's repeated failure to comply with the recommended treatment undermines his claim of pain, tingling and numbness especially during the March to May 2002 timeframe, a period during which he had been out of work for a knee injury, and presumably not engaged in repetitive use of the hands, wrists and arms.

tear or injury to the ligaments. *Id.* at 106; EX 46. When Mr. Bennett called to inform the Claimant of the MRI results, he reported that the Claimant expressed concern regarding the medical bills and whether the knee condition was a workers' compensation claim. Mr. Bennett stated that the current knee condition probably was related to the knee problems evaluated in 1995. EX 47 at 278.

The Claimant saw Physician's Assistant Bennett again on March 18, 2002 and reported continued knee pain and difficulties with some movements. CX 11 at 108. His gait was non-antalgic and his range of motion had improved, but he had mild tenderness over the corners of the knee. *Id*. The Claimant was treated with a cortisone injection and was released to return to work on April 18, 2002 on modified duty with restrictions. *Id.* at 107. Although Mr. Bennett continued the work restrictions he assigned in February, he did not check the box on the State of Maine Workers' Compensation Board form indicating the knee condition was work-related. During this visit, the Claimant informed Mr. Bennet that he was pursuing the right knee condition as a workers' compensation claim. *Id.* at 108.

On April 25, 2002 Dr. Wickenden, an orthopedic surgeon and Mr. Bennett's supervising physician, saw the Claimant in a follow-up examination. Dr. Wickenden's notes indicate that the Claimant has experienced improvement in his right knee condition. *Id*. On examination, Dr. Wickenden noted that the Claimant had full extension and range of motion, no instability and no pain on patellofemoral compression. Dr. Wickenden also stated that his knee condition is not consistent with anterior cruciate ligament injury as Mr. Bennett had suspected in early February. *Id*. The only symptom he noted was very small knee joint effusion. Dr. Wickenden released the Claimant to return to work on April 24, 2002, with directions to "restrict kneeling, squatting and crawling. Always use knee pads or matting to limit WB," and he stated he would see the Claimant on an as needed basis. *Id.* at 108-109. In completing the Practitioner's Report form used to inform the Employer of an employee's condition and any associated work restrictions, Dr. Wickenden did not indicate that the Claimant's right knee injury was related to his work. *Id.* at 109. Nor do Dr. Wickenden's notes state that the knee condition is work-related. In contrast, Dr. Wickenden's PA, Mr. Bennett, stated in response to the Claimant's inquiry that he thought the current knee condition "probably would be related" to the earlier knee problems evaluated in 1995. *Id.* at 106. I do not credit the opinion of PA Bennett in this regard. While I appreciate his training and experience, he is not a physician. Moreover, Dr. Wickenden, his supervising physician, did not confirm his opinion that the injury was work related and Dr. Wickenden disagreed with his initial diagnosis of anterior cruciate ligament insufficiency.

As noted above, at BIW's request, the Claimant was examined by Dr. Herzog in June of 2002 and 2003. EX 45; EX 56. At the time of the June 2002 examination, the Claimant reported right knee pain to Dr. Herzog. EX 45 at 270-273. Dr. Herzog noted that the Claimant exhibited some pain behaviors walking across the room. *Id.* at 271. On examination, Dr. Herzog noted a non-antalgic gait, heel and toe walking, and squat and rise without pain complaints. *Id*. He recorded good knee alignment, no effusion or joint line tenderness, and no instability. Dr. Herzog also stated that meniscus testing was negative. After examining the Claimant and reviewing the medical records including the MRI of the Claimant's knee, he concluded that the Claimant's right knee strain of February 2002 had resolved. In his 2002 report, Dr. Herzog concluded that there was no need for work restrictions for the right knee. EX 56 at 19-20. At Dr.

Herzog's second examination in June 2003, he stated that the Claimant reported that his right knee pain of a year ago had resolved. *Id.* at 23; EX 45 at 266. His 2003 report notes that the Claimant should perform bending and squatting activities on an as tolerated basis. CX 45 at 268.

Even if Dr. Wickenden had concluded that the Claimant's knee condition of February 2002 was related to his work at the shipyard, by April 25, 2002, Dr. Wickenden found that the right knee was normal with the exception of "persistence of a very small knee joint effusion" and indicated he would see the Claimant on an "as needed" basis. CX 11 at 108. Dr. Wickenden released the Claimant to return to work with restrictions on kneeling, crawling and squatting. Dr. Wickenden also opined that permanent impairment was not expected and that maximum medical improvement had not yet been reached. *Id.* at 109. The Claimant did not seek treatment for his right knee after Dr. Wickenden released him to work on April 25, 2002. As discussed above, Dr. Herzog's June 2002 examination of the right knee was entirely normal, with no effusion. By the 2003 examination, the Claimant reported that his knee condition had resolved and the objective examination results were the same as the 2002 examination. The objective findings along with the Claimant's statements to Dr. Herzog demonstrate that the Claimant does not have an ongoing right knee disability.

In addition to the medical evidence outlined above, surveillance evidence also supports the finding that any February 2002 injury to the Claimant's right knee has resolved. Surveillance evidence in the summer of 2002 and in May 2003, show the Claimant walking without difficulty, climbing in and out of a boat parked in his yard, bending over cleaning the boat, and climbing a small ladder, among other activities. EX 32, 34, 36 and 38. The surveillance tapes do not show evidence of functional limitations in the right knee or any ongoing right knee disability and the level of activity recorded is consistent with the objective medical findings of both the Claimant's physician Dr. Wickenden, and the Employer's consultant, Dr. Herzog. Accordingly, I find that the Claimant has failed to establish that he has a right knee disability.

4. Right shoulder injury - May 16, 2002

The Claimant alleges his right shoulder injury began as a traumatic injury in 1995, but that it has gradually worsened as a result of doing overhead work. Cl. Br. at 2. The Employer acknowledges that the Claimant had a shoulder injury in the early 1990s and that medical records show he recovered from that injury. Emp. Br. at 4, 20. The Employer argues that there is no evidence of a shoulder injury on May 16, 2002. *Id*.

The Claimant suffered a right shoulder strain in March 1995 when he slipped on a ladder and grabbed overhead with his right arm to prevent falling. CX 8 at 78. He was treated with ice, rest and muscle relaxants. The Claimant testified that his shoulder condition never improved but he conceded that he returned to work without restrictions after the 1995 incident and he continued to perform his normal job until February 2002, when he went out of work for an unrelated knee injury.

On January 30, 2001, the Claimant saw Dr. Pavlak for follow-up on his neck condition and at that visit he reported that he had experienced right shoulder pain over the past two weeks. CX 6 at 32. On examination, Dr. Pavlak noted a "strongly positive impingement sign and

horizontal abduction test," as well as "significant crepitus on… rotation of the right shoulder." *Id*. Dr. Pavlak stated that the Claimant appeared to have impingement syndrome with some bursitis in the right shoulder. Dr. Pavlak treated the shoulder condition with a steroid injection and recommended physical therapy. *Id.* at 33. The Claimant returned to Dr. Pavlak on February 28, 2001, reporting his shoulder condition substantially improved and that he can use his shoulder "pretty much ad lib at this point." *Id.* at 36. On a July 24, 2001, Dr. Pavlak notes that examination of the right shoulder shows no sign of pain and that impingement sign is negative. *Id.* at 40.

The Claimant saw Dr. Pavlak again on March 28, and May 9, 2002, for treatment of other conditions. He did not report shoulder pain or difficulty during either of these visits and it does not appear that Dr. Pavlak examined his right shoulder on those dates. *Id.* at 43-44, 46-47. When the Claimant consulted Dr. Pavlak again on August 8, 2002, Dr. Pavlak commented that physical examination found no acute distress and no pain behaviors and he indicated that the Claimant moves about the room freely. *Id.* at 50.

On September 13, 2002, the Claimant consulted with Dr. Pavlak complaining of right shoulder pain, neck pain and bilateral wrist pain with numbness and tingling. *Id.* at 53. He reported that his shoulder pain has been present for a year after a fall from a ladder at work. He reported that his shoulder is worse with work above the shoulder and lifting. *Id*. On examination of the shoulder, Dr. Pavlak detected no swelling or erythmea, but he noted generalized tenderness on palpitation throughout the shoulder, significant crepitus on all range of motion and a positive impingement sign. *Id*. Dr. Pavlak ordered an x-ray of the right shoulder. He also continued the restrictions on overhead work that he initially assigned for the Claimant's neck condition, but this time he stated the restrictions were right shoulder impingement and stated that the condition was work-related. *Id.* at 55.

On October 22, 2002, Dr. Pavlak injected the right shoulder with steroid and the Claimant obtained some immediate relief. *Id.* at 57. By November 7, 2002, the Claimant reported that the shoulder pain was reduced by 40% as a result of the injection. *Id.* at 64. In March 2003, Dr. Pavlak's progress notes continue to report right shoulder pain and a positive impingement sign and indicate that he injected the right shoulder with corticosteroid. *Id.* In April 2003, Dr. Pavlak arranged for an MRI of the right shoulder. *Id.* at 67-68. In May, Dr. Pavlak referred the Claimant to Augusta Orthopedics for the right shoulder as the MRI showed a partial tear to the supraspinatus of the right shoulder. *Id.* at 69.

On July 30, 2003, Dr. Anthony Mancini performed arthroscopic surgery on the Claimant's right shoulder to correct impingement syndrome. CX 9 at 96-97, 99-101. On the Practitioner's Report for the Maine Workers' Compensation Board, Dr. Mancini indicated the shoulder condition was work related and stated he did not know when the Claimant could return to work. *Id.* at 98, 103. Based on statements by Dr. Pavlak and Dr. Mancini that the right shoulder condition was work-related, the Claimant has successfully invoked the presumption of causation.

In attempting to rebut the presumption, the Employer notes that at Dr. Herzog's first examination on June 11, 2002, the Claimant did not report pain or any right shoulder condition.

EX 45 at 269-273; EX 56 at 30-32. At the time of Dr. Herzog's second examination on June 2, 2003, the Claimant was complaining of right shoulder pain and he informed Dr. Herzog that Dr. Pavlak had been treating his right shoulder condition for two years and recently referred him to Dr. Mancini, an orthopedic surgeon. EX 45 at 266. On examination in June 2003, Dr. Herzog found a positive right shoulder impingement sign but he noted that when he examined the Claimant a year earlier, he detected no sign of shoulder impingement. *Id.* at 266-267.

The Claimant has been out of work since early spring 2002. Based upon his June 2002 examination showing no sign of shoulder impingement, the June 2003 examination showing shoulder impingement and the Claimant's absence from work for well over one year, Dr. Herzog opined that the shoulder condition was not work-related and was the result of the type of activities the Claimant has engaged in during that period of time. EX 56 at 32; EX 45 at 263-265, 268. Specifically, Dr. Herzog pointed to surveillance evidence he reviewed which showed the Claimant engaging in various actions or activities with his boat or in his yard in 2002 and 2003. These activities included repetitive reaching above the shoulder height, hoisting himself from the ground up into the boat, and reaching and pulling maneuvers. Dr. Herzog stated that these activities involved "some rather extreme shoulder motions…" EX 45 at 263-264, 267-268; EX 32, 34, 36, 38. Based upon Dr. Herzog's opinion that the right shoulder condition is not related to the Claimant's work at the shipyard, I find that the Employer has successfully rebutted the presumption of causation. I must now consider all of the evidence.

The evidence establishes that the Claimant injured his shoulder in 1995, suffering a shoulder strain. The Claimant testified that his shoulder condition never improved after 1995; however, he continued to perform his regular work. The Claimant did not report any shoulder pain or condition to BIW in the intervening period between 1995 and January 2001 when he first reported shoulder pain to Dr. Pavlak. Notably, when he first complained of shoulder pain to Dr. Pavlak, the Claimant said the pain began two week ago. This statement is inconsistent with his testimony that his shoulder never improved after 1995. In the absence of reports or treatment for a shoulder condition, I find that the Claimant recovered fully from the 1995 shoulder injury and continued to work at his regular job for approximately seven years. The Claimant's inconsistent statements regarding the shoulder condition also undermine his assertion that the alleged May 16, 2002 shoulder injury is work-related.

Following the cortisteriod injection by Dr. Pavlak in January 2001, the Claimant did not report any shoulder pain or discomfort to Dr. Pavlak again until September 2002. However, by this date, the Claimant had been out of work for an unrelated condition for several months, since spring 2002. When he stopped working in early 2002, the Claimant did not report or complain of a right shoulder injury to BIW or to Dr. Pavlak, his physician. Nor did he report a shoulder injury or pain to Dr. Herzog in June 2002. Moreover, surveillance evidence in August 2002 shows the Claimant engaging in the type of activities or maneuvers that could cause injury to the shoulder. Although Dr. Mancini checked the box on the State of Maine Workers' Compensation Form indicating the right shoulder condition was work-related, the fact that the Claimant had not worked for over a year prior to his initial consultation with Dr. Mancini, and the fact that examinations of the shoulder between July 2001 and September 2002 showed no pain and no impingement sign significantly undermine Dr. Mancini's opinion. In addition, there is no evidence that Dr. Mancini had seen or considered the surveillance tapes showing rather vigorous

activity and shoulder movements in the summer of 2002 when he checked the work-related box on the state form. After considering all of the evidence, I find that the evidence fails to support a finding that the Claimant suffered an overuse injury to the right shoulder as a result of his employment on or about May 16, 2002.[7]

The Claimant attempts to discredit Dr. Herzog's testimony generally by arguing that he was not familiar with the Claimant's medical records. Cl. Br. at 5-6. In response to a question from the Claimant's counsel at his deposition, Dr. Herzog could not spontaneously list the medical records he reviewed in preparing his report, as he had not been given a list of all the records when he received them from the Employer. EX 56 at 34-38. However, Dr. Herzog had in his possession at the deposition, all of the Claimant's medical records that he reviewed and he offered to look through those records in order to respond to Claimant's counsel's specific question. *Id*. Claimant's counsel rejected the Doctor's offer, and now seeks to use this exchange to support her assertion that Dr. Herzog was unfamiliar with the Claimant's medical history. Overall, Dr. Herzog's reports and testimony accurately summarized the Claimant's medical history, and had the Claimant's counsel afforded him time to look through the records in his possession during his deposition, he may have been able to identify the specific records she was seeking. Accordingly, Claimant's contention that the Doctor did not know the Claimant's medical history lacks merit and is rejected.

D. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask ,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be

[7] It appears that May 16, 2002 is the last date the Claimant worked at the shipyard under the restrictions by Dr. Pavlak. The Employer was unable to provide work within the restrictions assigned by Dr. Pavlak and the Claimant was sent home that day.

considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In the present case, the Claimant fails to address the issues related to the nature of his disability relative to neck injury or any of the other alleged injuries. Cl Br. at 5, 7-9.[8] The Employer challenges the nature and extent of the Claimant's neck injury. Emp. Br. at 2.

I have found that the Claimant's neck condition is related to his work at the shipyard. The records from the BIW first aid department reflect that the Claimant has reported recurrent neck pain for a number of years before his neck injury of February 14, 2000. Since March 2000, Dr. Pavlak has treated the Claimant and the Claimant has reported neck pain on several occasions during that period of time. By November 18, 2002, Dr. Pavlak concluded that the Claimant's neck pain is chronic and is the result of cervical disk disease and his overhead work. Dr. Pavlak's treatment records show that the Claimant's neck condition has remained relatively constant since he began treating with Dr. Pavlak. Dr. Pavlak indicated that the Claimant's neck condition would probably remain the same and not worsen and it was uncertain that it would improve. Dr. Pavlak did not conclude that the Claimant had reached maximum medical improvement nor did he assess a permanent impairment rating for the Claimant's neck condition. Nevertheless, Dr. Pavlak's opinion that the Claimant's neck condition has remained essentially the same since his February 2000 injury establishes that the condition has continued for a long time and is of indefinite duration. Additionally, in June 2003 Dr. Herzog opined that the Claimant had reached maximum medical improvement and he assessed a 5% permanent impairment for the Claimant's chronic neck pain. EX 45 at 268.[9] Dr. Herzog's opinion that the Claimant had reached maximum medical improvement by June 2003 supports a finding that the condition is permanent. Accordingly, I find that the Claimant's neck injury has resulted in a permanent impairment under either of the two tests outline above. I further find, based upon Dr. Pavlak's treatment records for the Claimant's chronic neck pain and his letter to BIW indicating that the neck injury was chronic, unchanging and unlikely to improve, that the Claimant's neck disability became permanent on November 18, 2002. CX 6 at 59-60.

2. Extent of Disability

With regard to the extent of the injury, the Claimant seeks total disability pursuant to Section 8(a) of the Act as a result of the Claimant's February 14, 2000 neck injury.[10] Cl. Br. at 7-9**.** A three-part test is employed to determine whether a claimant is entitled to an award of

[8] Therefore, the Claimant's brief provides little assistance to the Court in resolving these issues.

[9] On August 8, 2003 Dr. Herzog sent a letter to the BIW workers' compensation department in response to a request that he review surveillance tapes documenting some of the Claimant's activities over several days in the summer of 2002 and in May of 2003. Dr. Herzog concluded that based upon the activities recorded on the tapes, there did not appear to be any significant impairment of functions with regard to the Claimant's neck, right knee or right shoulder. EX 45 at 263-264.

[10] The Claimant sought total disability based upon all four alleged injuries. I have determined that only one injury, the neck injury, is work-related and resulted in a permanent impairment.

total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air America, Inc. v. Director OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

As for the Claimant's initial burden, he testified without contradiction that approximately 90% of his regular duties as a pipefitter required overhead work. TR 24, 28.[11] As a result of his neck injury and ongoing neck condition, Dr. Pavlak restricted the Claimant to "minimal overhead work." CX 11 at 45.[12] Dr. Herzog did not assign any restrictions for the Claimant's neck condition. However, in his June 2003 report Dr. Herzog indicated that bending and squatting activities could be done on an as tolerated basis and that as a result of the Claimant's non work-related shoulder injury he should avoid heavy lifting and overhead work. CX 45 at 268; TR 77. Therefore, the restrictions Dr. Pavlak imposed for the Claimant's neck condition are essentially the same as the restrictions Dr. Herzog identified for the non-work-related shoulder condition. The Employer argues that the Claimant could perform work in his regular department at his regular rate of pay within the restrictions assigned by Dr. Herzog. Emp. Br. at 11-12, 20-21. It is not clear from the record whether the jobs identified by Mr. Bernier are pipefitter jobs or other jobs at BIW that the Claimant could perform within his restrictions. Therefore, to the extent that the Employer is asserting that the Claimant could perform his usual pipefitter duties, the Employer fails. Accordingly, based upon the Claimant's description of his regular duties and Dr. Pavlak's work restrictions limiting overhead work, or Dr. Herzog's restrictions of overhead work, I find that the Claimant could not return to his usual pipefitting duties.

The burden now shifts to BIW to show that there is suitable alternate employment either at BIW or in the local community which the Claimant is capable of performing and which he could obtain if he made a diligent effort. The Employer relies on the testimony of Stephen Bernier and the vocational analysis prepared by Memana Abraham in its effort to establish suitable alternate employment was available to the Claimant.

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[11] The Claimant fails to discuss the evidence as applied to meeting his prima facie case regarding the extent of disability. Cl Br. at 7. Rather, the Claimant addresses only the issue of whether the Employer has rebutted the "presumption of total disability." Cl. Br. 7-9.

[12] Dr. Pavlak also imposed work restrictions based upon his diagnosis of carpal tunnel syndrome (no repetitive use of the hands, wrists or forearms and no use of pneumatic tools). CX 6 at 44, 45. I have found that the alleged carpal tunnel syndrome injury was not established. Therefore, I do not consider the work restrictions Dr. Pavlak assigned for that condition.

Stephen Bernier, the manager of Craft Administration at BIW, testified that he had knowledge of the type of work available at the shipyard from the time the Claimant went out of work in the Spring of 2002 through the date of the hearing. TR 67-69. Mr. Bernier testified that BIW could have accommodated the restrictions assigned by Dr. Pavlak except those imposed for carpal tunnel syndrome (repetitive use of the hands and use of pneumatic tools). TR 70-75. Specifically, Mr. Bernier testified that the Employer could have accommodated Dr. Pavlak's restrictions on overhead work which are the restrictions he assigned for the Claimant's cervical spondylosis and neck pain. TR 70-71. He explained that the Claimant could have worked at BIW in the fabrication shop, in a preoutfit area where all work is downhand or ground level and in shipbuilding templates. TR 72-73. Mr. Bernier reported that the Claimant had sufficient seniority to displace other employees performing one of the identified positions. TR 73, 79-80. Mr. Bernier also testified that BIW could accommodate the restrictions assigned by Dr. Herzog in his 2003 report, which as discussed above, are similar to those imposed by Dr. Pavlak for the Claimant's neck condition. TR 77-78.

The Claimant raises several challenges to Mr. Bernier's testimony. First, the Claimant contends that Mr. Bernier did not know whether the Claimant's seniority would qualify him for the jobs identified. Mr. Bernier testified credibly and with certainty that the Claimant had a level of seniority sufficient to bump or replace another employee in any of the specific positions that Mr. Bernier identified as within his restrictions. Therefore, the Claimant's assertion to the contrary fails. Similarly, the Claimant's attempt to discredit Mr. Bernier's testimony because no specific job was offered to the Claimant lacks merit. The procedure at BIW required the Claimant to report to the medical department for review and had he agreed to accept the restrictions of Dr. Herzog or of Dr. Pavlak as they related only to the neck injury, he could have worked at BIW at his same rate of pay.[13]

Finally, the Claimant argues that although Mr. Bernier was aware that BIW had a drug policy regarding working while on medication, he was not aware of whether the Claimant would be permitted to work at the shipyard while taking the medication prescribed for him. Therefore, the Claimant argues the Employer has failed to establish suitable alternate employment. At the end of the hearing the parties agreed to make efforts to determine what the drug policy was and whether the Employer's drug policy was in writing and, if it were, to submit the policy as an exhibit. TR 84. The Employer's counsel also represented that Dr. Mazarra in the BIW first aid department administered the drug policy and he stated that if there were a written policy he would provide it. In addition, counsel stated that he would have Dr. Mazorra submit an affidavit explaining how the policy is applied. *Id*. Following the hearing, neither party submitted information on BIW's drug policy.

It is commonly understood that some medications, especially narcotic medications, may limit an individual's activities and may have an effect upon an individual's employability. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1044 (2d Cir. 1997). At the time of the hearing, the Claimant reported that he was taking Ultram, Percocet and Zanflex. TR 61. In determining

[13] BIW's assertion that the Claimant controlled the work restrictions Dr. Pavlak assigned is not entirely accurate. Dr. Pavlak's notes indicate that he suggested the possibility of work restrictions for the Claimant's neck injury to the Claimant when he first saw him on March 17, 2000 and again in July 2001.

whether suitable alternate employment is available at the Employer's place of business or in the community, one must consider all of the elements relevant to a Claimant's employability including, age, education, experience, and the medical restrictions, including medications and work limitations. The record lacks any evidence as to the Employer's drug policy, including the drugs covered by the policy and/or the positions that would be covered by the company drug policy. Mr. Bernier candidly acknowledged that he could not state that the Claimant would be permitted to work at the shipyard while taking the specific medications prescribed for him. Therefore, the Employer has failed to show that the Claimant could perform the jobs the Employer identified at the shipyard under the Employer's drug policy while taking the specific medications listed above.

Mr. Memana Abraham is a vocational rehabilitation counselor with over ten years experience and he is currently employed by the Windham Group. EX 41. Mr. Abraham provided a Labor Market Survey in October 2003. In preparing his analysis, he used the work restrictions assessed by Dr. Herzog in June 2003, which provided that the Claimant continues to have the "capacity for full-time work…but should avoid heavy lifting and overhead work due to his non occupational right shoulder condition…]and] should do bending and squatting activities on an as tolerated basis. EX 40 at 69 (citing EX 45 at 268). After evaluating the Claimant's age, education, experience and work limitations, Mr. Abraham identified six positions available in the local community. EX 40 at 77-79.

The Claimant contends that the labor market survey is inadequate because Mr. Abraham did not consider the impact, if any, of the medication the Claimant was taking on his suitability for some jobs such as truck driving job. Cl. Br. at 8. I note that none of the six jobs Mr. Abraham identified and personally contacted were truck driving jobs. However, for the reasons discussed above with regard to shipyard jobs identified by Mr. Bernier, the Claimant's contention that Mr. Abraham did not consider the fact that the Claimant was taking narcotic medication when he identified the six positions he believed were suitable, and therefore, the Employer has not established the existence of suitable jobs in the community, is well taken.[14] Accordingly, the Employer failed to meet its burden of establishing suitable alternate work either at the shipyard or in the local community. As a consequence, the Claimant has successfully established that he is totally disabled.

[14] The Claimant also contends that the labor market survey is inadequate because Mr. Abraham was unaware of several factors which limit the Claimant's employability. First, the Claimant argues that he utilized the work restrictions from Dr. Herzog rather than the more restrictive limitations from Dr. Pavlak. As I have concluded that Dr. Pavlak's carpal tunnel diagnosis was not supported by the evidence, the associated carpal tunnel work limitations are not appropriate. Thus, Dr. Herzog's restrictions are the same as Dr. Pavlak's remaining restrictions. Therefore, Mr. Abraham considered the applicable overhead work restriction in identifying suitable positions. Second, the Claimant asserts that Mr. Abraham did not indicate that he was aware that Mr. Stewart has anxiety and depression. The Claimant did not submit any records of treatment for anxiety or depression. Nor did he provide any statements from any physicians as to any functional limitations as a result of either anxiety or depression. Therefore, there is no evidence supporting work limitations resulting from anxiety or depression.

E. Average Weekly Wage

Section 10(a) of the Act provides the method for calculating average weekly wage for an injured employee who "worked in the employment…during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. 910(a). The parties disagree as to the appropriate average weekly wage at the time of the Claimant's neck injury. Using the formula for calculating the average weekly wage under section 10(a) of the Act, the Claimant contends that his average weekly wage is $604.27. Cl. Br. at 9. The Employer asserts that the average weekly wage is $514.53. Emp. Br. at 3.

The difference in the two figures results both from the different methods the parties used to arrive at the average weekly wage and the different annual earning figures used to calculate the appropriate wage. The Claimant asserts that the average weekly wage is calculated by dividing the annual earnings by the number of days worked to obtain the daily average. The daily average wage is then multiplied by 260 for a five day worker and divided by 52. Cl. Br. at 9. Applying this formula and purporting to rely on the wage record from the preceding year, the Claimant states that he did not work a full five days each week and that he worked a total of 212 days in the year before the injury. The Claimant states that dividing his annual earnings of $25, 620.85[15] by 212 results in an average daily wage of $120.85. This figure is then multiplied by 260 and divided by 52, resulting in an average weekly wage of $604.25. In contrast, the Employer arrives at the average weekly wage by dividing the Claimant's annual earnings of $26,240.85 by the number of weeks the Claimant worked (51) to arrive at an average weekly wage of $514.53. The Employer does not provide any explanation for the formula he uses in determining the average weekly wage. I recognize that using the formula the Claimant proposes will result in an inflated average weekly wage. However, the Board and Courts have recognized that the formula in Section 10(a) may result in some overcompensation. *See Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998); *Le Batard v. Ingalls Shipbuilding Div. Litton Sys*, 10 BRBS 317, 324 (1979). As the formula the Claimant urges is the formula provided by Section 10(a) of the Act, I will apply this formula in calculating the Claimant's average weekly wage. Applying this formula and using the correct annual earnings, results in an average weekly wage of $618.88 (($26,240.85 ÷ 212 = $123.77 (average daily wage) x 260 ÷ 52 = $618.88)).

F. Compensation Due and Interest

Based upon the foregoing findings, the Claimant is entitled to permanent total disability compensation benefits pursuant to Section 8(a) of the Act from May 16, 2002 to the present and continuing. Since the Claimant's compensation payments are overdue, interest shall be added to all unpaid amounts at the rate provided by 28 U.S.C. § 1961.

[15] The Claimant uses an annual earning figure of $25,620.85 for the year preceding the injury. Cl. Br. at 9. However, the wage records in evidence show annual earnings of $26,240 in the year preceding the injury. EX 26. The Claimant provides no explanation for how he arrived at his annual earning figure. Accordingly, I find that the Claimant's actual annual earnings in the year prior to the injury are $26,240.85 as reported on the wage record admitted at the hearing.

G. Entitlement to Medical Care

Based upon my findings that the Claimant's neck injury is related to his employment with BIW, he is entitled to reasonable and necessary medical care pursuant to Section 7 of the Act. 33 U.S.C. §907. A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. The Claimant is currently receiving treatment for his neck impairment. On these facts, I find that the Claimant has established that he is entitled to medical care. Accordingly, I will order the Respondents to provide medical care pursuant to Section 7.

H. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *Salzano* 538 F. 2d at 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Respondents will be granted 15 days from the filing of the fee petition to file any objection.

III. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer, Bath Iron Works, shall pay to the Claimant, Lauryn Bruce Stewart, permanent total disability compensation pursuant to 33 U.S.C. § 908(a) of the Act from November 18, 2002 to the present and continuing at a rate of 66 2/3 percent of the average weekly wage of $618.88. The Employer is entitled to a credit for amounts previously paid for this injury. The Employer shall pay interest on the above sums as of the date of this Order at the rate provided by 28 U.S.C. § 1961;

(2) The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related cervical spine condition may require pursuant to 33 U.S.C. § 907;

(3) The Claimant's attorney shall file, within 30 days of receipt of this Decision and Order, a fully supported and fully itemized fee petition pursuant to 20 C.F.R. § 702.132(a), sending a copy thereof to counsel for the Employer and carrier who shall then have fifteen (15) days to file any objections;

(4) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts